Nos. 89-1973 and 90-69

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent,

and

POWERLINE SUPPLY CO., INC.,
Petitioner,

v.

T.L. JAMES & COMPANY, INC.,
Respondent.

OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Respondent submits that the question presented for review is whether Congress, when it defined the term "owner or operator" in § 101(20)(A)(ii) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") as a "person owning or operating" a facility, intended—without so stating—to repudiate the traditional corporation law principle of limited liability, and thus make a parent corporation liable as the "owner or operator" of a facility that its subsidiary actually owns and operates, under circumstances in which fundamental rules of corporation law would not hold the parent responsible for its subsidiary's statutory or common law liabilities.

STATEMENT UNDER RULE 29.1

Respondent T.L. James & Company, Inc. is a closely-held corporation incorporated in the State of Louisiana and headquartered in Ruston, Louisiana. Respondent has no parent corporation, and all of its subsidiary corporations are wholly owned.

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OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

I. THE RULING BELOW

The Fifth Circuit's ruling below, affirming a grant of summary judgment in favor of respondent T.L. James & Company, Inc., is the *first* and *only* decision in the United States courts of appeals addressing the liability under CERCLA of parent corporations for

claims arising out of the conduct of their subsidiaries. As such, there is not and cannot be any conflict among the circuits.

Congress made the "owner or operator" of a pollution site liable for its cleanup. The Fifth Circuit observed that Congress had defined the term "owner or operator" as any "person owning or operating." Rejecting petitioners' argument that a parent company is the "person owning or operating" a subsidiary's facility, the court below held that Congress had given no indication in its definitional language that it "intended to alter so substantially a basic tenet of corporation law." 893 F.2d at 82. Applying the traditional tools of statutory construction—the plain meaning rule, examination of legislative history, examination of the legal background against which Congress acted, and comparison of other sections of the statute with petitioners' suggested reading of the instant section—the court of appeals concluded that Congress intended the courts to apply the federal common law of corporations to questions of parent-subsidiary liability arising under CERCLA. In this case, application of that federal common law rule resulted in a finding that the facts did not justify ignoring the separateness of Lincoln Creosoting Company, Inc., the subsidiary, and T.L. James & Company, Inc., the parent. That ruling, and the reasoning used to reach it, was fully correct.

II. THE FACTS OF RECORD

The U.S. District Court for the Western District of Louisiana, after complete discovery, entered summary judgment for respondent T.L. James & Company, Inc. ("James Co."), 696 F. Supp. 222 (W.D. La. 1988), based on what the Fifth Circuit found to

be an "extensive" factual record. 893 F.2d at 84. The facts that follow are drawn solely from the findings of the lower courts[1] or are taken from the corporate minute book of Lincoln Creosoting Company, Inc. ("Lincoln"), which was part of the undisputed record in the district court.

Lincoln Creosoting Company, Inc. was incorporated in 1935. C.A. Tooke and J.R. Hayes approached Mr. T.L. James with the proposal that if he would put up the initial capital they would purchase land, and build and operate a creosoting business. It was agreed that Tooke and Hayes would own 40% of the 200 shares of voting common stock, and that James Co. would own 60% of the common stock and all 200 shares of the non-voting preferred stock. James Co. apparently paid the entire initial capitalization, and Tooke and Hayes endorsed their shares back to James Co. as security for their unpaid capital subscription.[2] Shortly thereafter Lincoln purchased the property at issue in this suit in its own name. Tooke signed the purchase note for Lincoln.

At the initial meeting of the Lincoln Board of Directors on December 17, 1935, Tooke was elected Vice President and designated "General Manager with full power and discretion to conduct the affairs" of Lincoln. Hayes became Treasurer. The business was

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[1] *See* 696 F. Supp. at 227-31; 893 F.2d at 81-82

[2] Both petitioners suggest that this security arrangement constituted a transfer of ownership or control of the shares. *E.g.*, Joslyn Petition 2; Powerline Petition 3. In light of the facts that Tooke and Hayes were later able to transfer ownership of some of their shares, regularly voted their shares, and ultimately received the appreciated value of their shares, petitioners' suggestions are incorrect.

built on the Bossier City property selected by Tooke, who lived across the river in Shreveport (James Co. was based in Ruston, some 65 miles away), and in May, 1936, Lincoln opened its corporate bank account in Shreveport. Only Hayes and Tooke (not Mr. T.L. James) had check-signing authority.

The facts demonstrate that "Lincoln operated quite independently from James Co." 893 F.2d at 83. From 1935 to 1950, when its business was sold, Lincoln observed all the formalities of a separate corporation as meetings were held and memorialized, and detailed and separate financial books and records kept. In 1942 and 1943, minority shareholder participation broadened as two key Lincoln employees, H.R. Freeman (Sales and Marketing Manager) and J.B. Plummer (accounting), purchased 13 shares of Lincoln stock from Tooke and Hayes; Freeman and Plummer later became members of the Lincoln Board.

In July, 1944, T.L. James died, and the Lincoln Board elected his son, G.W. James, as President of Lincoln. G.W. James soon became concerned about Lincoln's losses in 1943 and 1944 and called upon his cousin, J.E. Lacy, for help in determining the cause. When Lacy reported back that Hayes's lack of commitment was the problem, James Co. bought out Hayes. In late 1944, G.W. James, as President of Lincoln, hired Lacy to replace Hayes; as his condition of accepting the position, Lacy became the owner of all Hayes's Lincoln stock at the price paid to Hayes by James Co. At the ensuing Lincoln Board and shareholders meetings on March 13, 1945, Lacy was elected director and treasurer.

At the same March, 1945, shareholders meeting, a five-person Board of Directors was elected, replacing

the original seven-member Board. The new Board consisted of three Lincoln employees (Tooke, Lacy and Freeman) and only two persons associated with James Co. From that time on, officers or directors of James Co. never again constituted a majority on the Lincoln Board.[3] In 1947, the Board was expanded to eight—four Lincoln employees/minority shareholders (Tooke, Lacy, Freeman and Plummer) and four persons also associated with James Co. This Board remained in office until Lincoln was dissolved.

By 1947, Lincoln had become a substantial company with earnings over $400,000, and total capital exceeding $600,000. Lincoln had its own property, employees, payrolls, equipment, accounts, letterhead, insurance, pension system, sick pay system and workman's compensation program, none of which was directed by or shared with James Co. Lincoln always filed separate income tax returns—in 1947 it paid more than $160,000 in taxes—and was not consolidated with the returns or accounting system of James Co.

On May 4, 1950, C.A. Tooke died. At a special meeting of the Lincoln Board on May 15, 1950, G.W.

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[3] Petitioner Powerline Supply Co., Inc. ("Powerline") incorrectly claims in its Petition that "[a]t all times, James Company controlled a majority of Lincoln's directors." Powerline Petition 5. Petitioner Joslyn Manufacturing Company ("Joslyn") similarly claims, based on Lacy's lineage, that "[w]ith Lacy's vote, James Company continued to control Lincoln's Board. . . ." Joslyn Petition 3. Both the district court, 696 F. Supp. at 228-29, and the court of appeals, 893 F.2d at 81, specifically rejected petitioners' family relations theory of corporation law, finding that Lacy—who had no position with James Co.—was a bona fide minority shareholder and Lincoln officer.

James led a discussion concerning the future of Lincoln "without the leadership of Mr. Tooke."

> He stated that, as everyone knew, Lincoln Creosoting Company had been originally organized through the efforts of Mr. Tooke and that it had been the attitude of those in Ruston [where James Co. was headquartered] that it was Mr. Tooke's enterprise and had been since it was first organized. . . . He stated further that he felt without Mr. Tooke it was the opinion of those in Ruston that the business should be sold, as no one here was interested in assuming the managership of the creosoting business. . . .
>
> A complete discussion at great length followed, with complete expressions being offered by Mr. Lacy, Mr. Tooke [Jr.], Mr. Plummer and Mr. Freeman. Following this thorough discussion, it was agreed that we should immediately make every effort to sell the business. . . .

Lacy then came into contact with petitioner Joslyn and a deal was negotiated. Joslyn purchased the real estate and other assets on August 1, 1950. As Lincoln's business was being wound up and the transfer of accounts to Joslyn completed, Lincoln repurchased as treasury stock some of the minority holdings of Freeman, Plummer, Lacy, and the Tooke heirs, paying $2,250 per common share.[4]

In November, 1951, sixteen months after the sale of assets to Joslyn, the shareholders of James Co.

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[4] In light of this fact, Powerline's claim that Lincoln was "a wholly owned subsidiary of James Company," Powerline Petition 3, is flatly incorrect.

voted to make a "donation from T.L. James & Company, Inc. to Centenary College of Louisiana . . . consisting of all shares of stock of Lincoln Creosoting Company, Inc. presently owned" by James Co. In December, 1951, Centenary College became the majority shareholder of Lincoln.

At the ensuing Lincoln shareholders meeting of December 18, 1951, attended by Lacy, Plummer, Freeman, Tooke's widow and son, and Paul M. Brown on behalf of Centenary College, it was decided to liquidate Lincoln. The Certificate of Dissolution, filed with the Louisiana Secretary of State, noted that "all debts, obligations and liabilities" of Lincoln had been paid and discharged. The assets were then distributed to the shareholders—Lacy, Freeman and Plummer, the heirs of Tooke, and Centenary College—"in accordance with their respective rights and interests."

ARGUMENT

I. BECAUSE THIS IS THE ONLY CASE TO BE DECIDED IN THE COURTS OF APPEALS ON THE QUESTION OF PARENT-SUBSIDIARY LIABILITY UNDER CERCLA, THERE IS NO CONFLICT AMONG THE CIRCUITS

Both petitioners argue that this Court should issue writs of certiorari because of an alleged conflict in the federal courts of appeals on the question of whether, and if so, under what test, a parent corporation is liable under CERCLA as an "owner or operator" of a facility actually owned and operated by its subsidiary. Each petitioner cites *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985), as the conflicting decision; Powerline also asserts that *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743-44 (8th

Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), is in conflict.

The Fifth Circuit ruling that is the subject of these petitions is the *first* and *only* appellate decision on the question of a parent corporation's liability for a subsidiary corporation's cleanup costs under CERCLA.[5] There is no "conflict with the decision of an-

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[5] The following opinions regarding parent-subsidiary liability under CERCLA, at various procedural stages, have been issued in the district courts:

City of New York v. Exxon Corp., 31 Env't Rptr. Cas. (B.N.A.) 1412 (S.D.N.Y. 1990) (holding parent liable on summary judgment as "transporter" under § 107(a)(4)); *United States v. Kayser-Roth Corporation*, 724 F. Supp. 15 (D.R.I. 1989), *appeal pending*, 1st Cir. No. 90-1190 (entering judgment for plaintiff following trial); *United States v. McGraw-Edison Co.*, 718 F. Supp. 154 (W.D.N.Y. 1989) (denying parent's motion for summary judgment); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193 (E.D. Pa. 1989) (denying parent's motion to dismiss); *Rockwell Int'l Corp. v. IU International Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988) (denying parent's motion to dismiss); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988) (granting plaintiff's motion for summary judgment); *In Re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22 (D. Mass. 1987) (granting parent's motion to dismiss); *Colorado v. Idarado Mining Co.*, 18 Env't L. Rptr. (E.L.I) 20578 (D. Col. 1987) (granting State's motion for summary judgment); *Idaho v. Bunker Hill Corp.*, 635 F. Supp. 665 (D. Idaho 1986) (granting State's motion for summary judgment).

There are numerous other cases addressing the liability of officers, employees, directors, and other individuals with a role in a corporation—including *New York v. Shore Realty* and *United States v. Northeastern Pharmaceutical & Chemical*, *supra*—as well as numerous decisions involving the liability of successor corporations. Though some courts have failed to observe the appropriate distinctions, these two classes of cases present different issues than are involved in the instant petitions.

other United States court of appeals on the same matter." Supreme Court Rule 10.1(a).

The Second Circuit case of *New York v. Shore Realty, supra,* does not involve a parent corporation at all. In *Shore Realty,* a closely-held corporation, all the stock of which was owned personally by Donald LeoGrande, purchased a waste storage site. Mr. LeoGrande personally managed the waste operation at the property, including authorizing waste to be brought to the site. The Second Circuit held that he was personally liable as the "operator" because, "[i]n any event," he was "in charge of the operation" and "specifically directs, sanctions, and actively participates" in the corporation's waste operation. 759 F.2d at 1052.[6] No parent corporation existed, no parent-subsidiary issues were discussed in the opinion, and no parent corporation was held liable in *Shore Realty.*

The Eighth Circuit's decision in *Northeastern Pharmaceutical & Chemical ("NEPACCO"), supra,* cited as conflicting by petitioner Powerline, also does not involve a question of parent-subsidiary liability. Moreover, *NEPACCO* also does not involve the subject of

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[6] Petitioner Joslyn quotes a portion of the opinion in the court below in which the court, in the course of summarizing Joslyn's contentions, includes *Shore Realty* along with four district court decisions as cases that "have extended CERCLA liability to parents." 893 F.2d at 82. While, in a sense, *Shore Realty* "extended" CERCLA liability to an individual stockholder of a corporation, it did so on the ground that the sole stockholder, as an *individual,* actively and personally managed the waste operation at the site. That holding does not conflict with the holding of the Fifth Circuit in the instant case that the fundamental rule of corporate limited liability has not been displaced by CERCLA § 101(20)(A)(ii).

"owner or operator" liability, the issue in the instant case. The *NEPACCO* appellate court held only that John Lee (the plant manager and a minority shareholder) was *personally* liable under § 107(a)(3), 42 U.S.C. § 9607(a)(3), as a "person who arranged for disposal" of wastes. Mr. Lee was not held liable under § 107(a)(2) as an "owner or operator." The Eighth Circuit based its ruling on standard federal common law grounds—that Mr. Lee "personally participated in the [corporation's] wrongful conduct." *See* 810 F.2d at 744, *citing Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (officer liable under federal common law for participating in corporation's Lanham Act violation). Again, no parent corporation was involved in the litigation and no issue of parent liability for subsidiary conduct was addressed in the Eighth Circuit's opinion.

II. THE FIFTH CIRCUIT CORRECTLY INTERPRETED CERCLA AND CORRECTLY APPLIED A UNIFORM FEDERAL COMMON LAW TEST FOR PARENT-SUBSIDIARY LIABILITY

A. The Language Of The Statute And Its Legislative History Contain No Hint That Fundamental Corporation Law Principles Should Not Apply

Joslyn brought this action claiming that James Co. was liable under § 107(a)(2), 42 U.S.C. § 9607(a)(2), which makes liable:

> (2) any person who at the time of disposal of any hazardous substance *owned or operated* any facility at which such hazardous substances were disposed of. . . .

(Emphasis added.) "Owner or operator" is a defined term:

> (20)(A) The term "owner or operator" means . . . (ii) in the case of an onshore facility . . . *any person owning or operating* such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (emphasis added). Thus, for an onshore facility, like the one at issue here, an "owner" is "any person owning" and an "operator" is "any person . . . operating" that facility. There is an exemption for titled holders of a "security interest."

The CERCLA definition of "owner or operator" and the "security interest" exemption attached to it are traceable in the legislative history to separate provisions in the original Senate and House bills. The original Senate bill, 96th Cong., S. 1480, provided in Section 2(1) thereof that the term "owner or operator" "shall have the meaning provided in Section 311(a)" of the Clean Water Act.[7]

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[7] Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), provided that "owner or operator" means "(B) in the case of an onshore facility . . . any person owning or operating such onshore facility. . . ." This is the exact definitional language now found in CERCLA § 101(20)(A)(ii). In the only case to address parent-subsidiary liability under § 311 of the

The original House bill on this subject, 96th Cong., H.R. 85, introduced six months before the Senate bill, expressly exempted from its definition of "owner," any person "who, without participating in the management or operation of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." H.R. 85, § 101(x). This provision is the source of the "security interest" exemption in CERCLA § 101(20)(A).[8]

In light of the statutory language, and the absence in the legislative history of any suggestion that a parent corporation should be liable when traditional corporation law principles would not impose liability, it is not surprising that *neither petitioner offers a single citation to the legislative record* regarding this definition to support their claims about what Congress "intended." Congress expressed no intent to depart from fundamental corporation law.

Clean Water Act, the court applied traditional common law veil-piercing rules in finding a parent corporation liable for conduct by its subsidiaries. *United States v. Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt. 1973), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

[8] "Congress intended by this [security interest] exception to exclude . . . common law title mortgagees from the definition of 'owner' since title was in their hands only by operation of the common law." *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986). *See also id.* at 580 (discussing H.R. Rep. No. 172, Part 1, 96th Cong., 1st Sess., at 36 (1979), and concluding that "Congress intended to protect banks that hold mortgages in jurisdictions governed by the common law of mortgages. . .").

B. Congress Acts Against The Background Of The Common Law And Its Silence Is A Strong Indication That Traditional Common Law Rules Should Apply

Congress defined "owner or operator" in CERCLA § 101(20)(A)(ii), by reference to everyday concepts—persons "owning" and "operating." It did not suggest in the legislative history that the words were not to have their usual meanings. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Thus, "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." *Id.*

Adherence to this rule has special import when Congress has used terms with a well-understood common law meaning. *See Morisette v. United States*, 342 U.S. 246, 263 (1952). In such a case, the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986). Rejecting a suggestion that a 1972 longshoremen's statute had *sub silentio* changed a traditional concept of tort liability, this Court observed that "the reports and debates leading up to the 1972 Amendments contain not a word of this concept. *This silence is most eloquent, for such reticence while contemplating [what would be] an important and controversial change in existing law is unlikely.*" *Edmonds v. Cam-*

pagnie Generale Transatlantique, 443 U.S. 256, 267 (1979), *reh. denied*, 444 U.S. 889 (emphasis added).[9]

C. Congress Knows How To Disregard the Corporate Form If It Desires And, Indeed, Did So In The Next Subsection Of CERCLA Itself.

The district court observed that its conclusion that Congress had not intended silently to override traditional corporation law "is buttressed by the fact that Congress has, in the past, specified that shareholders or controlling parties are to be held responsible for the acts or debts of a valid corporation." 696 F. Supp. at 226. The district court cited four statutes where Congress had explicitly determined to ignore the corporate form. There are many other examples, including, the court of appeals found, 893 F.2d at 83, one in the *very next clause of the very definition at issue in this case.*

"Owner or operator" is defined in CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). In the case of an "onshore facility," like the one at issue here, the applicable provision is in clause (ii)—an "owner or operator" is "any person owning or operating." By contrast, in case of a facility conveyed to a state or local government due to bankruptcy, tax delinquency or abandonment, the applicable definition is in clause

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[9] In light of these cases, Joslyn's heavy reliance on a New Hampshire district court's finding that the "absence of explicit statutory language addressing the effect of incorporation . . . lead[s] the court to the conclusion that CERCLA places no importance on the corporate form," is misplaced. *United States v. Mottolo*, 695 F. Supp. 615, 624 (D.N.H. 1988), *quoted at* Joslyn Petition 11. What the New Hampshire court has done, of course, is to turn the law on its head—congressional silence affirms traditional corporation law, not repeals it.

(iii)—an "owner or operator" is "any person who owned, operated *or otherwise controlled* activities at such facility immediately befor[e]" conveyance. CERCLA § 101(20)(A)(iii), 42 U.S.C. § 9601(20)(A)(iii) (emphasis added). Congress expressly reached out to include a "control" test in clause (iii) for this limited circumstance of facilities abandoned to state or local governments. Since "[n]o such 'control' test appears in subsection (ii)"—the *immediately preceding* clause—the court below held, "we will imply none." 893 F.2d at 83. The simple solution (should one be needed or desired) constitutionally belongs to the legislative branch not the judiciary: amend § 101(20)(A)(ii) to include a "control" test.

Both petitioners argue that because CERCLA is a remedial statute, this Court's "interpretation" should, for policy reasons, broaden CERCLA's scope. In dozens of cases, though, both this Court and the courts of appeals have read remedial statutes against their common law background and have declined invitations radically to rewrite such statutes. *E.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-201 (1976) ("remedial purpose" of Securities Exchange Act not sufficient to "add a gloss to the operative language of the statute quite different from its commonly accepted meaning"); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (Civil Rights Act did not silently abolish common-law immunities); *DeBrecini v. Graf Brothers Leasing, Inc.*, 828 F.2d 877, 879-80 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) (remedial purpose of ERISA not sufficient to alter "background norm" of shareholder's limited liability); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156-57 (7th Cir.

1988) (CERCLA's purpose does not justify ignoring its limited language).

D. The Fifth Circuit Properly Applied A Uniform Federal Common Law Rule

Because Congress did not address the question of parent-subsidiary liability in clause (ii) of its definition of "owner or operator," the court below applied the uniform federal common law of corporations found in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). In doing so, the court below complied with CERCLA's legislative history directive "that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. at S14964 (Nov. 24, 1980) (Statement of Sen. Randolph).[10] *See also Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 839 (1989) (applying federal common law to question of successor corporation's liability as CERCLA "owner or operator").

Petitioner Joslyn states repeatedly, but inaccurately, that the court below "relied solely on a state law 'alter ego' analysis." *E.g.*, Joslyn Petition 12; *see also id.* at ii (second question presented: should CERCLA be implemented under a "federal common law analysis, rather than state law"); *id.* at 9 (lower courts "limited their attention to whether Lincoln's . . . veil should be pierced under state law"). *United States v. Jon-T Chemicals*, relied upon by the court below, however, is definitively a federal common law case:

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[10] Because Sen. Randolph was co-sponsor and floor manager of the legislation, his statements have substantial weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

> [W]e find no need to determine whether a uniform federal alter ego rule is required [to be created], since the federal and state alter ego tests are essentially the same. Our non-diversity alter ego cases have rarely stated whether they were applying a federal or state standard, and have cited federal and state cases interchangeably.

Jon-T Chemicals, 768 F.2d 686, 690 n.6.

Jon-T Chemicals involved a cost recovery claim by the United States against a parent corporation under a federal statute, the False Claims Act. Explicitly observing that the "case involves 'rights of the United States arising under nationwide programs,' " *id.*, *quoting United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), the *Jon-T Chemicals* court found that the traditional corporation law was the uniform federal rule. The *Jon-T Chemicals* rule fully effectuates the federal interest in cost recovery while giving due regard both to the strength of the States' federalism interests in not having their laws unnecessarily upset and to the constitutional inhibitions that compel judicial deference to Congress's choice to leave the common law in place. *Kimbell Foods*, *supra* at 729; *United States v. Yazell*, 382 U.S. 341, 352-53 (1966); *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1118, 1127-28 (5th Cir. 1980) (en banc) (Faye, J., concurring), *cert. denied*, 450 U.S. 936 (1981).

Both the district court and the Fifth Circuit properly applied the federal common law analysis of *Jon-T Chemicals*—a case involving a cost recovery claim under a federal statute by the United States against a convicted thief—to Joslyn's CERCLA claim against

James Co. Joslyn's second asserted question in its petition is thus erroneously premised.

CONCLUSION

The ruling of the Fifth Circuit, as the first and only one by a court of appeals on the question of parent-subsidiary liability under CERCLA, is not in conflict with the decision of any other United States court of appeals on the same matter. Further, the Fifth Circuit properly discerned congressional intent and properly applied a federal common law test of parent-subsidiary liability. The petitions for writs of certiorari should be denied.

Respectfully submitted,

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